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November 14, 2011

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Via Email and U.S. Mail

Re: Ecology's Two-Part Rulemaking Process for Regulatory Flexibility Rules and Toxics Human Health Criteria in Water Quality Standards

Dear Director Sturdevant and Mr. Susewind:

We, the undersigned groups, write to express our grave concern with Ecology's proposed approach to delaying adoption of new toxic criteria for the protection of human health in Washington. From Puget Sound to the Columbia River—and in countless other waterbodies across the state—catching and eating local fish and shellfish is a quintessential part of being a Washingtonian. Yet the human health criteria in Washington's water quality standards are among the nation's least protective.

On November 2nd Ecology announced that it would be moving forward with rulemaking on new and modified rules to increase regulatory flexibility for pollution dischargers to comply with the Clean Water Act. The agency is framing this rulemaking as a requisite step **before** initiating rulemaking on protective human health criteria (*i.e.*, before the state adopts more stringent human health criteria, off-ramps must be in place to ease the burden of compliance on pollution dischargers). For the reasons explained below, Ecology's decision to continue to delay adoption

of protective human health criteria and create a two-stage process undermines the agency's duty to protect public health. To the extent Ecology believes that so-called "implementation tools" must be in place before new human health criteria are adopted, the agency must not use this process to: (1) further delay the development of new human health criteria, and (2) leave open the very real possibility that pollution dischargers will have the benefit of "regulatory flexibility" for years if not decades before Ecology takes action and adopts new human health criteria.

In the last two decades, scientific evidence on toxic contamination in Washington fish and shellfish has mounted, just as studies on Washingtonian's fish consumption rates have demonstrated how outdated the state's current criteria are. Following last year's scoping process for the on-going Triennial Review, and at the urging of the U.S. Environmental Protection Agency's (EPA), Tribes, and others, Ecology finally acknowledged that adopting new human health criteria must be an agency priority. We are heartened by Ecology's decision to adopt new fish consumption rates across state programs, including water quality standards. Ecology, however, now proposes waiting until at least late 2012 before even initiating the rulemaking process for new criteria. Given Ecology's failure to adopt protective human health criteria to date, we urge you to: (1) promptly set a firm and swift schedule for adopting water quality standards that truly reflect the rate at which Washington's citizens consume fish and shellfish, and (2) modify the current rulemaking schedule to call for adopting, to the extent necessary and appropriate, implementation tools **simultaneously with the adoption of new human health criteria.**

As you know, Washington is currently under the EPA National Toxics Rule (NTR), with toxic criteria based on 6.5 grams per day of fish consumption. This is equivalent to less than one fish meal per month. To put this in perspective, EPA now recommends that states use a default consumption rate of 17.5 grams per day of fish consumption and EPA just approved Oregon's change to human health criteria based on 175 grams per day. By relying on the NTR, Ecology is clearly failing to protect its citizens from the serious threats of toxic pollution.

Ecology appears to be proceeding in the same fashion as Oregon, namely that the *quid pro quo* of adopting new, protective human health criteria is that there be as many options for regulated sources to avoid those new criteria as the state can develop and EPA will approve. Ecology, however, need not re-plow the same ground as Oregon, which already vetted at least a dozen potential permitting rules with EPA, the vast majority of which were eliminated from further consideration because they were contrary to federal law. The heavy lifting on these so-called implementation tools – which are really tools to avoid or postpone implementation – has already been done. With that effort made minimal by Oregon's efforts, there is no reason to approach this rulemaking effort in two separate steps, thereby postponing the adoption of long overdue protective criteria.

In fact, the only reason that this process of looking at "implementation tools" could be anything other than a minimal effort is if Ecology intends to address the control of toxics from currently un- and under-regulated sources in the water quality standards themselves, in particular through the antidegradation policy and its federally-required implementation methods. For example, where agricultural sources are a primary source of toxics, implementation tools should include

mandatory erosion control. Similarly, where Ecology's Toxics Cleanup Program has highlighted the higher rate of toxic concentrations in urban and industrial embayments of Puget Sound, Ecology should look at expanding the jurisdiction of municipal areas covered under stormwater permits pursuant to CWA section 402(p)(2)(E) & (p)(6). Likewise, Ecology could move beyond the limitations of the federal pretreatment program to control toxic inputs into sewage collection systems from industrial, commercial, and residential sources. And, it could use Toxics Release Inventory (TRI) data to identify significant sources of air deposition and move to adopt state rules to limit such sources. Moreover, Ecology should be including the development of an extensive methylmercury implementation methodology as part of its "implementation tools."

There is not, however, any indication that Ecology is looking past the efforts used by Oregon to create regulatory flexibility for NPDES sources. We believe that not taking this opportunity to look specifically at how to control toxics would be a major policy omission because it would forgo achieving real environmental and human health benefits associated with changing fish consumption rates.

We would also like to bring to your attention the effect the proposed delay will have on the source control efforts that are allegedly at the heart of the new Framework for Sediment Cleanup Decisions that was recently issued in support of rulemaking efforts by the Toxics Cleanup Program. The Framework document frequently refers to the need for "source control," including but not limited to NPDES permits for sources that are seeking full settlements in their clean-up commitments. Delays in adopting water quality criteria based on appropriately updated fish consumption rates will lead to delays in Ecology's issuing NPDES permits that contain fish consumption rates consistent with clean-up actions; the inconsistency between agency programs will undermine the fundamental principles sent out in the Framework.

The case for adopting protective human health criteria has been building in Washington for over a decade. In the interim, the problem of toxics accumulating in fish and shellfish has grown. After waiting in the wings for Oregon to adopt a new fish consumption rate and human health criteria, Ecology is finally acknowledging that adopting accurate human health criteria is a state priority. We applaud this decision, but urge the state to put words into action: delaying the process to adopt new human health criteria is not treating the issue as a "priority." In short, we request that the agency refine its proposed rulemaking schedule to promptly develop and adopt protective human health criteria in its water quality standards.

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Sincerely,

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Columbia Riverkeeper

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